RENDERED: MARCH 24, 1994
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

93-SC-946-TG

COMMONWEALTH OF KENTUCKY, REVENUE CABINET; KIM BURSE, in her official capacity as Secretary; KENTUCKY REVENUE CABINET; COMMONWEALTH OF KENTUCKY, CABINET FOR HUMAN RESOURCES; FONTAINE BANKS, JR., in his official capacity as Secretary; KENTUCKY CABINET FOR HUMAN RESOURCES; KENTUCKY HEALTH CARE DATE[sic] COMMISSION - - - - - - - - - - *Appellants*

v.

CHARLES C. SMITH, JR., M.D.; FRED L. BARNETT, M.D.; WILLIAM B. MONNIG, M.D.; KENTUCKY MEDICAL ASSOCIATION; STUART G. YEOMAN, M.D.; TIM HULSEY, M.D.; JOE DAVIS, M.D., President, Warren County Medical Society; JOSEPH JANES - - - - - - - - - - *Appellees*

On Transfer From Court of Appeals
No. 93-CA-002840
(Franklin Circuit Court No. 93-CI-000959)

OPINION OF THE COURT BY JUSTICE REYNOLDS REVERSING

This appeal is from the final judgment of Franklin Circuit Court for which transfer was granted. CR 74.02. The enactment of House Bill 1, "the provider tax," (codified as KRS 142.201-142.259 and KRS 216.270-216.287), was the subject and product of an extraordinary session of the 1993 Kentucky General Assembly. The trial court determined

that a tax on physicians violated Section 59 (15) of the Kentucky Constitution. To the extent provided in this opinion, we reverse the lower court's decision and hold that the health care provider tax as applied to physicians is constitutional.

Under the Medicaid program, of the 7,132 Kentucky licensed physicians and clinics, 4,514 treat and provide services to Medicaid patients. Under House Bill 1, a 2 percent of gross revenue tax was imposed on physicians' services and the tax proceeds are utilized to obtain federal matching money to support Kentucky Medicaid. Thirty-one percent of the state's share of the Medicaid expenditures is derived from the providers' tax monies which are available for the matching funds. The state's general fund provides the rest of the state's share. The question is whether the General Assembly lacks the ability to define the class of providers being taxed.

It is neither the wisdom or expediency of this legislation that concerns the court, for that is a matter for the legislative branch of our government. The sole duty herein is scrutiny of the act in light of the constitution.

It is the specter of unconstitutional classification that has formed the basis of appellees' argument. The broad discretion as to classification which a legislature possesses in the field of taxation has long been recognized. Discretion is needed in the formulation of basic and sound tax policies and classification is appropriate for fitting tax programs to both usages and needs. It has been held, because of these factors, that in taxation, more so than in other fields, the legislative bodies possess the greatest of freedom in classification. *Madden* v. *Kentucky,* 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 590 (1940). Courts, under a rational basis review, accept the legislature's generalizations even when there is an imperfect fit between means and ends. *Heller* v. *Doe By Doe,* ____ U.S. _____, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993). Further, in a taxation case, unless a rational basis for such law can be completely refuted, then the law may stand as constitutional. Notably, the burden

on the ones attacking the legislative tax arrangement is the negation of every conceivable basis which might support it.

Vital state interest does, in fact, in this case mean vital state interest as this state provides medical care to over 500,000 Kentuckians, which is over 14 percent of this state's citizenry, under the provisions of the Kentucky Medical Assistance Program (Medicaid). There is an established federal criteria for states to obtain federal matching funds for the Medicaid program and it was amended in 1991, necessitating a state change. Therefore, to qualify for federal matching money, any tax on health care providers was required to be uniform and broad based within each class of taxed providers. Omitted was the ruse of hold harmless provisions whereby the participating physicians were permitted recoupment.

In this case, were the state to run afoul by imposing a tax considered impermissible under the federal regulations, there would occur a reduction of the state's total medical assistance by the amount of any impermissible health care tax that is collected. This act under consideration applies to *all permissible health care providers,* whether or not they participate in the Medicaid program, and complies with federal criteria because of its uniformity and broad base. The annual provider tax revenues generated by the act have been legislatively estimated to be approximately $147 million, of which $32.4 million is attributable to the tax on physicians.

Franklin Circuit Court reasoned that the 2 percent tax on physicians' gross revenues provided for in House Bill 1 violated Section 59 of the Kentucky Constitution, which prohibits special legislation, and utilized the cases of *City of Louisville* v. *Kuntz,* 104 Ky. 584, 47 S.W. 592 (1898) and *Board of Educ. of Jefferson Co.* v. *Board of Educ. of Louisville,* Ky., 472 S.W.2d 496 (1971), as supportive of its position. Noted, but without discussion, was that the tax was not limited to 60 percent of the physicians that participated in the Medicaid program, but applied to all physi-

cians rendering health care services in the state. Thus, it was concluded that the increase in funding and the indirect benefit to only 60 percent of the doctors who did participate in providing services did not support a rationale for overcoming Kentucky Constitution Section 59(15). The classifications were deemed to be illogically related to the purpose of the act. We find such conclusion unacceptable.

The enacted legislation and federal criteria as to qualification for federal matching money forms a rational basis in the General Assembly's actions resulting in House Bill 1. These federal mandates were not illusionary, but were real and pressing at the time of the legislation. Simply put, the Kentucky statute was designed to meet the federal statute which provides and enumerates the specific requirements as to the class of health care providers that may be taxed in order to qualify for matching funds. The trial court was in error by finding the classifications illogically related to the purpose of the act.

The mammoth scope of the Medicaid program provides such an enormous subsidy to the health care system so as to benefit all health care providers, whether they participate in direct reimbursement provisions or not. It follows that it is not illogical for the General Assembly to tax the health care industry for 31-plus percent of the state's funds which are to match the scope of the much larger federal funds. The prevalence of provider taxes serves to establish the perimeters of the class providers who could be taxed to fund Medicaid. The Kentucky statute, as the parties appear to concede, is coextensive with the federal law. Thus, when a state elects to enact a provider tax, its discretion in classifying those who will be taxed appears circumscribed by federal law. Thus, defining the class in a coextensive manner with the federal law results in a rational basis for such classification without arbitrariness. The act delineates the class of entities subject to the tax and, thus, the General Assembly necessarily excludes and includes certain entities within the scope of the tax. Judicial approval given to legislative classifications for tax purposes appears

to be well established. *Department of Revenue* v. *Spalding Laundry and Dry Cleaning Co.*, Ky., 436 S.W.2d 522 (1969).

It has been further established that classification is permissible when it appears as a natural method of legislation, as long as the classification is neither unreasonable nor arbitrary and, thus, applies equally to all in a class. *Schoo* v. *Rose*, Ky., 270 S.W.2d 940 (1954). A requisite, therefore, is the rationality of the basis as between the classification established and the governmental purpose to be achieved. As there is no suspect classification in this case, the act meets the rational basis standard to be deemed constitutional.

Section 59(15) of the Kentucky Constitution prohibits "local or special acts" which are "to authorize or regulate the levy, the assessment or the collection of taxes . . . ." The primary purpose of Section 59 and the 29 subsections is the protection of Kentucky's citizenry from special interest groups. *Tabler* v. *Wallace*, Ky., 704 S.W.2d 179 (1985), *cert. denied*, 479 U.S. 822, 107 S.Ct. 89, 93 L.Ed.2d 41 (1986). Reasons of a positive nature are necessary for justifying the legislation.

To overcome freedom of classification and the presumption of validity requires an explicit demonstration that a tax is hostile and oppressive against particular persons and classes. *Delta Air Lines, Inc.* v. *Com., Revenue Cabinet*, Ky., 689 S.W.2d 14 (1985). State tax statutes provide many examples of classifications and due process, and equal protection analysis in tax matters requires the court to determine simply whether there is a rational basis for the legislative action. *Federal Communications Commission* v. *Beach Communications, Inc.*, ___ U.S. ____, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993); *Reynolds Metal Co.* v. *Martin*, 269 Ky. 378, 107 S.W.2d 251 (1937).

The populace, as a whole, derives benefits from a healthy citizenry. The providers of health care may receive immediate and direct results of a fund that pays their charges/fees for treatment of the indigent. No physician taxed is prohibited from participating in the Medicaid program, but

some voluntarily do not participate. Recognizing such, the General Assembly afforded the ability to participate in Medicaid a necessary prerequisite to being subject to the tax.

Supportive of a class legislation is the public purpose of indigent care which forms a reasonable basis for levying a tax on such classes enumerated by the federal government. The legislature, in this case, has acted within the classification perimeters and, in effect, resisted the overtures of health care lobbyists by their revision of the health care provider tax to be used as a portion of the state's matching funds for the federal Medicaid fund. House Bill 1 addresses a completely different legislative situation than the *Tabler* court addressed.

The Florida Supreme Court in the case of *Coy* v. *Florida Birth-Related Neurological Injury Compensation Plan,* 595 So.2d 943 (Fla. 1992), determined there was a rational relationship of a health care related tax imposed on all licensed physicians, not merely obstetricians, to fund a state-wide program which compensates victims of birth-related neurological injuries, despite the fact that not all physicians taxed were obstetricians who would benefit. The basic rationale, in part, is the relationship of a tax to the delivery of health care in general. Herein, all physicians taxed under House Bill 1 may participate in the Medicaid program and receive direct benefits. It is natural and reasonable that the 40 percent of the physicians who pay the tax but do not participate in the Medicaid program may continue their type of practice with a diminished strain on the hospital system. Said otherwise, the 40 percent of the physicians are not in a vacuum in relation to the 60 percent, and there is a rational interrelationship between the two percentages of physicians, with each group having real benefits.

Standards applicable are succinctly stated in Justice Wintersheimer's concurring opinion in *Gillis* v. *Yount,* Ky., 748 S.W.2d 357 (1988), which follows:

> Constitutional limitations prohibit only such classification which is not [sic] arbitrary and unreasonable

> and has no fair and substantial relation to the permissible governmental purpose of the legislation. The classification for taxation is a policy matter for legislative determination. Ordinarily the judgment of the legislature is to be deferred to if there is any just and reasonable basis to support such a decision. The question then becomes whether it was arbitrary and unreasonable for the legislature to create a separate classification . . . . (Citation omitted).

Appellees have argued that the provider tax is unconstitutional because the legislature should have enacted a more broadly based tax, the argument being that a classification is unconstitutional as being special legislation if a more general law could have been enacted. Section 59(29) merely adds to the list of 28 prohibitions and states: "In all other cases where general law can be made applicable, no special law shall be enacted." Thus, the legislation must first be special (arbitrary) under the *Gillis* v. *Yount* test, but relate to a subject not covered in the 28 enumerated subsections for Section 59(29) to be applicable. Stated otherwise, any law not as broad as might be envisioned would be unconstitutional. The fact that an alternative is available to the legislature does not render unconstitutional the alternative which has been chosen by the legislature. For example, the progressive income tax would be unconstitutional, as well as all exemptions from the sales tax. When taken to an extreme, this argument would deprive a legislature of any discretion in making classifications for taxation and from creating exemptions.

The enactment of a state statutory plan based on a voluntary federal statutory plan was determined to be general legislation and constitutional under Section 59. *See Waggoner* v. *Waggoner,* Ky, 846 S.W.2d 704 (1993), *cert. denied,* ___ U.S. ___, 114 S.Ct. 346, 126 L.Ed.2d 310 (1993). *Waggoner* further provides that the fact that the legislature deals with a special subject does not *per se* make it special legislation. *See Kentucky Milk Marketing and Anti-Monopoly Commission* v. *Borden Co.,* Ky., 456 S.W.2d 831 (1970). A general law relates to persons or things as a

class, while a special law relates to particular persons or things of a class, per *Waggoner*. The tax in this case imposed upon the physicians, a federally defined class, meets the definition of a general law. The appellees' argument of an underinclusive class is not persuasive.

The rational basis for enacting this legislation is referenced in this record and existed at the time of the statute's enactment.

Sections 1, 2 and 3 of the Kentucky Constitution embrace the equal protection clause of the Fourteenth Amendment to the United States Constitution. While the circuit court omitted any reference/basis for its decision as to whether House Bill 1 violates principles of due process and equal protection, we find that by meeting the test of Section 59, House Bill 1 also meets the test of Sections 2 and 3 of the Kentucky Constitution. Such concern was addressed in *Revenue Cabinet* v. *Estate of Marshall,* Ky. App., 746 S.W.2d 408 (1988), which holds that classifications were not *per se* unreasonable since a rational basis has been determined for the classifications. Moreover, the *Tabler* court found Section 59 of the Kentucky Constitution to be more than simply restating the generalized language of the equal protection clause of the Fourteenth Amendment to the United States Constitution. Justification under Section 59 equates to reasonable justification under Sections 2 and 3 of the Kentucky Constitution.

A cross-appeal, pursuant to CR 74.01, was not filed herein, but has been included among the issues discussed by appellees. The title of House Bill 1 was styled: "An Act relating to health and safety, providing for revenues to finance health care, making appropriations, and declaring an emergency." Violation of Section 51 of the Kentucky Constitution was raised in that "no law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title. . . ." Construction of this section has found a liberal course with all doubts as to compliance resolved in favor of the validity of the legislative action. *Commonwealth ex rel. Armstrong* v. *Collins,*

Ky., 709 S.W.2d 437 (1986). Continuing, if the title furnishes a "clue" to the act's contents, it may pass constitutional muster. *See Talbott, Auditor of Pub. Accts.* v. *Laffoon,* 257 Ky. 773, 79 S.W.2d 244 (1934). Further illustrative are the cases of *District Bd. of Tuberculosis Sanatorium Trustees of Fayette Co.* v. *Bradley,* 188 Ky. 426, 222 S.W. 518 (1920); *Anderson* v. *Wayne Co.,* 310 Ky. 597, 221 S.W.2d 429 (1949); and *Dawson* v. *Com., Dept. of Transp.,* Ky., 622 S.W.2d 212 (1981). We suggest that a party reading the title to House Bill 1 might conclude that a tax was being imposed to finance health care as it stated " . . . providing for revenues to finance health care . . . ." This argument concerning misinformation or misunderstanding is without merit due to the fact that the appellees were also in attendance during the hearing and the special legislative session. Their presence, coupled with high media visibility and debates, makes it hard to conclude that this legislation comports with the intent of the constitutional framers to invalidate the statute on the ground that its title is not sufficiently descriptive.

We do not find that a benefit/burden analysis forms a basis of support for the providers, *Sims* v. *Board of Educ. of Jefferson Co., Ky.,* Ky., 290 S.W.2d 491 (1956), nor does Section 59(15) of the Kentucky Constitution require exactingly equal treatment. In essence, unequal treatment has been acceptable. *Reynolds Metal Co.* v. *Martin, supra.*

The appellants agree that the circuit court properly severed Sections 22 through 29 of House Bill 1. Therefore, this matter is a nonissue as it is neither essential to, nor inseparable from the other provisions of House Bill 1.

The appellees' motion for the recusal of the three special justices of this court was passed to the merits. The appointment by the governor of three special justices under Section 110(3) of the Kentucky Constitution was occasioned by the recusal of three sitting justices, which appellees now deem to he violative of that section, which provides:

> A majority of the justices of the Supreme Court shall constitute a quorum for the transaction of business. *If as many as two justices* decline or are unable to sit in the trial of any cause, the chief justice shall certify that fact to the governor, who shall appoint to try the particular cause *a sufficient number of justices to constitute a full court* for the trial of the cause.

The language of this constitutional section, deemed limiting, simply does not lead to the interpretation advanced by appellees. To resolve a limiting doubt, if any, one may read and consider, in its entirety, the language in Section 110(3), which provides that the governor "shall appoint to try the particular cause a sufficient number of justices to constitute a full court. . . ." We resolve that a gubernatorial appointment under this section arises from the necessity to appoint two or more special justices, the number of vacancies of two or more being the determinative factor for appointment.

The phraseology which appellees attribute to *Kentucky Utilities Co.* v. *South East Coal Co.*, Ky., 836 S.W.2d 407, (1992), *cert. dismissed*, ___ U.S. ___, 113 S.Ct. 1147, 122 L.Ed.2d 498 (1993), does not flow therefrom in a manner or with a meaning that inhibits the gubernatorial appointment of two justices or a sufficient number that would constitute a full court. The Supreme Court Rules neither address nor provide for the appointment of more than one justice. *Kentucky Utilities, supra,* addressed the authority and manner of appointment when only one justice was disqualified. *Ex parte Auditor of Public Accounts,* Ky., 609 S.W.2d 682, 685 (1980) states this court's position as to the filling of vacancies when two or more justices are recused:

> The constitutional check-and-balance relationship between the executive and judicial branches of the government consists of the provisions for filling vacancies in judicial offices and for the appointment of temporary substitutes *when two or more justices of the Supreme Court decline or are unable to participate in the disposition of a cause pending before that court.* Const. Secs. 118, 110(3). Those relationship between the leg-

> islature and judicial branches exist by virtue of Const. Secs. 110(4), 111(1), 112(2) and (3) and 113(2) and (3), pertaining to judicial districts and number of judges and justices; . . .

This direction has continued to be recognized and followed consistently in those situations requiring the appointment of two or more special justices. *See J.C.J.D.* v. *R.J.C.R.*, Ky., 803 S.W.2d 953 (1991), wherein all justices of the Supreme Court recused and the disposition of the particular case was decided by seven special justices, appointed by the governor, pursuant to Constitutional Section 110(3), to constitute a full court. The gubernatorial appointment of a "special" justice to the Supreme Court is further addressed in KRS 21A.120(1).

No argument has been sufficiently advanced as to raise an infirmity under the federal and state constitution which results from the governor's fulfilling his duties of judicial appointment under Section 110(3). Neither is there a necessity to develop a convoluted construction supportive of Section 110(3). We acknowledge the argument which has been advanced by the providers pertaining to the governor's active participation in the question of health care reform. The allegation of the appointment of "tainted" special justices ignores those constitutional sections which require the governor to make appointments in light of his constitutional duties. We believe that the question of recusal of each individual special justice has been addressed in this record and was determined as stated in the concurring opinion of *Kentucky Utilities*. Thus, recusal is a personal matter to be decided by each individual justice in the absence of any so-called *per se* disqualification or statutory prohibition.

The appellees' challenges extend even further and relate to the governor, his relationship to and interest in the legislation, political association with the appointees, and the like. Suffice it to say that the affidavits at no point make allegations of impropriety against the three sitting special justices nor have specific allegations of bias or preju-

dice been raised against them. Special justices and regular justices, when no valid reasons for recusation exist, have a duty to sit. *See Pessin* v. *Keeneland Ass'n,* 274 F.Supp. 513 (Ky. 1967); *Foster* v. *Commonwealth,* Ky., 348 S.W.2d 759 (1961), *cert. denied* 368 U.S. 993, 82 S.Ct. 613, 7 L.Ed.2d 530 (1962).

To the extent provided in this opinion, we reverse the lower court's decision and hold that the health care provider tax as applied to physicians is constitutional.

Stephens, C. J., Special Justice S. Cawood, Special Justice B. Fletcher III, and Special Justice R. Westberry concur.

Stumbo, J., dissents by separate opinion in which Wintersheimer, J. joins.

Wintersheimer, J., concurs in part and dissents in part by separate opinion in which Stumbo, J. joins.

Attorneys for Appellants:

LEONARD G. ROWEKAMP
SMITH, WOLNITZEK, SCHACHTER & ROWEKAMP
P. 0. Box 352
Covington, Kentucky 41012

CATHY CRAVENS SNELL
DANA B. MAYTON
Revenue Cabinet
Division of Legal Services
P. 0. Box 423
Frankfort, Kentucky 40602

MASTEN CHILDERS, II
EDWARD D. KLATTE
STANLEY A. STRATFORD
Office of the Counsel
Cabinet for Human Resources
275 East Main Street
Frankfort, Kentucky 40601

Attorneys for Appellees:

BRUCE F. CLARK
C. J. CRONAN, IV
MARK OVERSTREET
TIMOTHY C. KIMMEL
STITES AND HARBISON
421 West Main Street
Frankfort, Kentucky 40601

KENT MASTERSON BROWN
CRISTOPHER J. SHAUGHNESSY
1114 First National Building
167 West Main Street
Lexington, Kentucky 40507

RENDERED: MARCH 24, 1994
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

93-SC-946-TG

COMMONWEALTH OF KENTUCKY, REVENUE CABINET; KIM BURSE, in her official capacity as Secretary; KENTUCKY REVENUE CABINET; COMMONWEALTH OF KENTUCKY, CABINET FOR HUMAN RESOURCES; FONTAINE BANKS, JR., in his official capacity as Secretary; KENTUCKY CABINET FOR HUMAN RESOURCES; KENTUCKY HEALTH CARE DATE[sic] COMMISSION - - - - - - - - - - *Appellants*

v.

CHARLES C. SMITH, JR., M.D.; FRED L. BARNETT, M.D.; WILLIAM B. MONNIG, M.D.; KENTUCKY MEDICAL ASSOCIATION; STUART G. YEOMAN, M.D.; TIM HULSEY, M.D.; JOE DAVIS, M.D., President, Warren County Medical Society, JOSEPH JANES - - - - - - - - - - *Appellees*

On Transfer From Court of Appeals
No. 93-CA-002840
(Franklin Circuit Court No. 93-CI-000959)

DISSENTING OPINION BY JUSTICE STUMBO

Respectfully, and with some reluctance, I must dissent. I agree with the majority opinion's excellent analysis as to the constitutionality of taxing those involved in health care as a class for the purpose of obtaining federal funding to support Kentucky Medicaid. It is the disparate treatment of the subclasses by House Bill 1 that I find unacceptable.

House Bill 1 (codified as KRS 142.201-142.259 and KRS 216.270-216.287) sets up three classes of health care providers which are taxed at different rates, and one of which is permitted to "pass on" to the recipient of the taxable item or service the tax imposed. Hospitals are taxed at a rate of 2 1/2 percent of gross revenues. KRS 142.202. Health care providers other than hospitals (e.g., physicians, health maintenance organizations, nursing homes for the mentally retarded, and others) are taxed at the rate of 2 percent of the gross revenues. KRS 142.207. Pharmacies and others dispensing out-patient prescription drugs are taxed at the rate of 25 cents per prescription. KRS 142.211. Of this last class, only pharmacies are permitted to pass the tax on to insurers, health maintenance organizations, and non-profit hospital and health service corporations. KRS 142.211 (1)(a).

Physicians can, and do, dispense out-patient prescriptions, yet they are forbidden to pass on the 25 cent tax that pharmacies are permitted to pass on. KRS 142.213 (1). Additionally, pharmacies are permitted to pass on the same tax to a provider, as defined by KRS 142.207, already subject to taxation; that is, a health maintenance organization which in turn is forbidden to pass on the tax. The result is that a health maintenance organization pays both the 2 percent tax on its gross income and the 25 cent per prescription tax passed through it by the pharmacies. Thus, two members of the same subclass are treated differently. These differences compel me to conclude that these subclassifications are unreasonable and arbitrary in that the members of the subclasses are not treated equally. *Schoo* v. *Rose,* Ky., 270 S.W.2d 940 (1954).

WINTERSHEIMER, J., joins in this dissent.

RENDERED: MARCH 24, 1994
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

93-SC-946-TG

COMMONWEALTH OF KENTUCKY, REVENUE CABINET; KIM BURSE, in her official capacity as Secretary; KENTUCKY REVENUE CABINET; COMMONWEALTH OF KENTUCKY, CABINET FOR HUMAN RESOURCES; FONTAINE BANKS, JR., in his official capacity as Secretary; KENTUCKY CABINET FOR HUMAN RESOURCES; KENTUCKY HEALTH CARE DATE[sic] COMMISSION - - - - - - - - - - *Appellants*

v.

CHARLES C. SMITH, JR., M.D.; FRED L. BARNETT, M.D.; WILLIAM B. MONNIG, M.D.; KENTUCKY MEDICAL ASSOCIATION; STUART G. YEOMAN, M.D.; TIM HULSEY, M.D.; JOE DAVIS, M.D., President, Warren County Medical Society; JOSEPH JANES - - - - - - - - - - *Appellees*

On Transfer From Court of Appeals
No. 93-CA-002840
(Franklin Circuit Court No. 93-CI-000959)

OPINION BY JUSTICE WINTERSHEIMER CONCURRING IN PART AND DISSENTING IN PART

I concur with the parts of the Majority Opinion which apparently endorse the legislative philosophy of dedication of tax funds to a particular perceived need. I also concur with the concept of deference to the General Assembly in matters of taxation in general. I further concur with the analysis of the Fourteenth Amendment and Sections 1, 2 and 3 of the Kentucky Constitution. However, I must

respectfully dissent from those aspects of the Opinion which deal with the application of constitutional principles to the specific facts of this case in regard to the subclassification of physicians.

As I noted in my concurring opinion in *Gillis* v. *Yount*, Ky., 748 S.W.2d 357 (1988), the question becomes whether it was arbitrary and unreasonable for the legislature to create a separate subclassification in this case. The problem centers on the classification of those 60 percent of the physicians who participate in Medicaid as contrasted with those 40 percent of physicians who do not participate in the program in any way. One of the greatest dangers to thoughtful analysis in any case involving taxation and the relationship between the judiciary and the legislature or executive is a generalization. Each case must be carefully examined on its own merit.

Here the principal problem relates to a benefit/burden test which produces an arbitrary tax on those 40 percent of the physicians who do not participate in the program. Such a situation is more than unfair or unequal—it is arbitrary. It is understood that this analysis already accepts the segregation of physicians from general taxpayers into a class of their own. Classification by the legislature should be affirmed except as here where there is no rational basis and the legislation is arbitrary. *Delta Air Lines, Inc.* v. *Commonwealth, Revenue Cabinet*, Ky., 689 S.W.2d 14 (1985).

Any extension of the benefits/burdens test can lead to further assignment of tax revenue from all contractors, engineers and architects who could possibly benefit from providing construction work on the state's highways. The same limited application of taxation and the revenues produced thereby could be applied to lawyers for the benefit of the justice system. The list of potential classifications is endless. The problem with disparate treatment of members of a subclass is that it singles out those who do not participate in a particular program as having derived a benefit therefrom. It is impossible to distinguish the ben-

efit the nonparticipating physicians have in funding Medicaid from that of the general population.

The classification is invalid as it applies to 40 percent of the physicians who do not participate in Medicaid. *Cf. Board of Education of Jefferson Co.* v. *Board of Education of Louisville,* Ky., 472 S.W.2d 496 (1971).

In this legislation, the classification created is both too narrow and too broad. It is too narrow because it does not include as taxpayers other people who receive payment for services to Medicaid patients such as chiropractors, dentists, nurses, mid-wives and transportation providers. It has always been the law that it is essential to the constitutionality of taxation that it apply equally to all persons in a given class. A tax which discriminates between different members of a class or subclass should be considered void. *Denton* v. *Porter,* 284 Ky. 114, 143 S.W.2d 1056 (1940).

The legislation does not apply equally to all who are nonphysicians who have been included in the class. There is a difference in tax rates because physicians are taxed at 2 percent of gross; hospitals are taxed at 2-1/2 percent of gross; and pharmacies are taxed at 25 cents per prescription. In addition, physicians who prescribe medicine are prohibited from passing on the tax to their patients while pharmacies are allowed to pass on their provider tax to third party payers. Kentucky has long prohibited disparate treatment of persons selling medicine as a violation of the Kentucky Constitution Section 59. *Commonwealth* v. *Payne Medicine Co.,* 138 Ky. 164, 127 S.W. 760 (1910).

Taxing only certain healthcare providers to fund Medicaid is as flawed as would be a system which would tax only school teachers to pay for new educational facilities or taxing only licensed psychologists to pay for public mental health care facilities, or taxing only policemen to pay for victim compensation programs. *Cf. Coy* v. *Florida Birth-Related Neurological Injury Compensation Plan,* Fla., 595 So.2d 943, Kogan J. dissenting, *cert. denied, McGibony* v. *Florida Birth-Related Neurological Injury Compensation Plan,* ___ U.S, ___, 113 S.Ct. 194, 121 L.Ed.2d 137 (1992).

An extension of this idea would perhaps include a tax on grocery store operators on gross receipts to maintain a food stamp program.

The class is too broad because not every physician receives payment from Medicaid. In order for a classification to be constitutional, it must be framed as to be exclusively applicable to the person or things sought to be embraced therein. *Priest* v. *State Tax Commission,* 258 Ky. 391, 80 S.W.2d 43 (1935). It is clearly a gratuitous oversimplification of the law to announce that all physicians somehow benefit from Medicaid payments. If legislation is so broad in its scope as to embrace objects not naturally belonging therein, it does not pass the test under Section 59 of the Kentucky Constitution. *Safety Building & Loan Co.* v. *Ecklar,* 106 Ky. 115, 50 S.W. 50 (1899). A more constitutionally valid system might tax physicians who receive payments for services to Medicaid patients.

Physicians are not the direct or intended beneficiaries of Medicaid programs, the indigent patients are. Participating physicians and other healthcare providers are compensated for their services rendered and therefore receive indirect benefits. A number of shortcomings brings the constitutionality of the legislation into question. The problems include the question of equal protection and arbitrary legislation, the issue of the title not indicating that the bill involves a tax but rather revenue and finance, and veto arguments. The Majority Opinion has properly decided these issues.

The Franklin Circuit Court reasoned correctly that the imposition of a tax on certain physicians was a violation of Section 59 of the Kentucky Constitution which prohibits special legislation. The tax was not limited to the 60 percent of the physicians who participated in the Medicaid program and by assumption benefited thereby, but applied to all physicians rendering health care services in the State. I believe it was incorrectly assumed that an increase in funding was an indirect benefit to those doctors who did not participate.

Although we can only decide the case before us, I do not believe this Court should ignore the fact that there are a number of other cases involving state taxation. The public press reports that the Revenue Cabinet is now involved in 11 major lawsuits. It is not difficult to understand why the taxpayers are very concerned in a society in which ordinary working people will pay in excess of 40 percent of their gross income in taxation. As noted by the Majority Opinion, the question of taxation is a peculiarly legislative function of government. The only role of the court is to review a specific tax on the grounds of arbitrariness or improper classification. Each case must be reviewed on a case-by-case approach.

This Court decided *Commonwealth of Kentucky, Revenue Cabinet* v. *Cope* on January 31, 1994, to the effect that a legislative grant of exemption was a legitimate classification between private and government pension plans. There is a difference between the imposition of taxes and the grant of an exemption from taxes. It was possibly a shortcoming that the *Cope, supra,* decision did not make it clear that the legislature could exempt all pensions, both private and governmental as one of the options to which the court deferred. The legislature still has that option.

"The power to tax involves the power to destroy" noted Chief Justice John Marshall in *McCulloch* v. *Maryland,* 17 U.S. 159 (4 Wheat. 316), 4 L.Ed. 579 (1819). The duty of the judiciary is to distinguish between constitutional error and proper deference to the legislature. Unequal treatment really should not be acceptable although it is seemingly approved by the Majority Opinion.

There may be many different views as to how to apply the same standards. The responsibility for fashioning fair tax laws is that of the General Assembly. It cannot be delegated and it cannot be assumed by any other branch of government.

STUMBO, J., joins in this opinion.

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I

Civil Action Nos. 93-CI-00959
93-CI-01275

CHARLES C. SMITH, Et Al. - - - - - - *Plaintiffs*

v.

COMMONWEALTH OF KENTUCKY, REVENUE CABINET, Et Al. - - - - - - - - - - - *Defendants*

AND

HEALTH MAINTENANCE ORGANIZATION ASSOCIATION OF KENTUCKY, INC., Et Al. - - - - - *Plaintiffs*

v.

COMMONWEALTH OF KENTUCKY, REVENUE CABINET, Et Al. - - - - - - - - - - - *Defendants*

ORDER—Entered November 23, 1993

I. STATEMENT OF THE CASE

This action is a consolidation of three separately filed cases. *Charles C. Smith, Jr., M.D., et al.*, v. *Commonwealth of Kentucky Department of Revenue, et al.*, 93-CI-0959, was filed July 2, 1993. *Stewart G. Yeoman, M.D., et al.* v. *Commonwealth of Kentucky Department of Revenue et al.*, 93-CI-01097, was filed July 23, 1993. *Yeoman* was consolidated into *Smith* by Order of the Franklin Circuit Court dated September 2, 1993. *Health Maintenance Organization Association of Kentucky, et al.* v. *Commonwealth of Kentucky Department of Revenue et al.* was filed August 19, 1993. On September 2, 1993, this case was consolidated with *Smith* for purposes of briefing schedules and oral argument.

The Plaintiffs in these consolidated cases are Dr. Fred L. Barnett, Dr. Joe Davis, Dr. Tim Hulsey, Dr. William B. Monning, Dr. Charles C. Smith, Jr., Dr. Stewart G. Yeoman, the Kentucky Medical Association, the Health Maintenance Organization Association of Kentucky, and nine health maintenance organizations ("HMO's") operating in Kentucky.

Each physician Plaintiff is licensed to practice medicine in the Commonwealth of Kentucky and each of them except Dr. Barnett participates in the state Medicaid program. Dr. Barnett does not participate in Medicaid but accepts indigent patients as a regular part of his practice.

The Kentucky Medical Association is a nonprofit Kentucky corporation representing approximately 4,000 physicians. The Health Maintenance Organization Association of Kentucky is a nonprofit corporation organized to promote the business interests of its members, health maintenance corporations authorized pursuant to Chapter 304, Subtitle 38 of the Kentucky Revised Statutes.

The Defendants are the Kentucky Revenue Cabinet ("the Revenue Cabinet") and its Secretary Kim Burse, the Kentucky Cabinet for Human Resources ("CHR") and its Secretary Fontaine Banks, and the Kentucky Health Care Data Commission ("the Commission"). The Commission is an administrative agency established by House Bill 1, Section 22, passed by the Second Extraordinary Session of the General Assembly, 1993. The Commission is authorized to investigate, audit, and analyze data concerning Kentucky's health care providers.

At issue in this consolidated action are taxes on health care providers imposed by House Bill 1 which was enacted in response to the Medicaid Voluntary Contribution and Provider Specific Tax Amendments of 1991. (Pub. L. 102-234). These amendments restricted federal financial participation ("FFP") in Medicaid programs in states whose programs were partially funded by "impermissible health care related taxes." The 1991 Amendments invalidated

the provider tax then in effect in Kentucky. The Kentucky tax was an impermissible health care related tax because it: (1) was only assessed against providers who participated in the Medicaid program; (2) included a hold harmless provision; and (3) taxed different providers at different rates depending on their Medicaid receipts. Each of these provisions violated the federal amendments of 1991.

House Bill 1 established provider taxes that would comply with the strictures set out in the 1991 Federal Amendments and maximize the state's eligibility for federal matching funds. The bill taxed several categories of health care providers. Section 2 established a 2.5 percent tax on hospitals' gross revenues. Section 3(1) imposed a 2 percent tax on the gross revenues of physicians, a tax applicable to all physicians regardless of whether they participated in the Medicaid program. Section 4(1) established a 25 cent tax on each prescription and Section 4(1)(a) permitted this tax to be passed along to insurers, HMO's, and other health service corporations. Section 5(1), on the other hand, prohibited hospitals and physicians from passing on the tax imposed on them. Section 20 provided for funding the disproportionate share program.

A Senate Amendment to House Bill 1 established the Health Care Data Commission. Sections 22 to 30. Section 29 of the Senate's amendment made cooperation with the Commission a condition of licensure in the state.

The Governor vetoed a portion of House Bill 1 and there was no legislative review of the bill after that veto.

1. GROUNDS FOR RELIEF, *SMITH*

The Plaintiffs in *Smith* request Summary Judgment declaring House Bill 1 and all of its provisions void, unconstitutional and unenforceable. They further request a Permanent Injunction against Secretaries Burse and Banks from enforcing and implementing the provisions of the bill.

The Plaintiffs request this relief on constitutional grounds. They claim that House Bill 1 violates their right to due process guaranteed by the United States and Ken-

tucky Constitutions. In support of this claim, Plaintiffs argue that there is no rational basis to tax physicians more than the general public to fund a program such as Medicaid which benefits society as a whole. They also claim that the bill's prohibition against passing through the tax violates their due process rights to charge their patients in a manner and amount they deem appropriate.

The Plaintiffs challenge the bill on equal protection grounds. They claim House Bill 1 sets up unreasonable, arbitrary, and unfair classifications that are not substantially related to the purposes of the legislation. Plaintiffs also claim that all people similarly situated are not treated alike. They maintain that the legislation is too broad because it covers all physicians regardless of participation in the Medicaid program and they claim that it is too narrow because it does not cover all health care professionals who do participate in Medicaid.

The Plaintiffs contend that House Bill 1 violates Section 59 of the Kentucky Constitution which prohibits indiscriminate legislative classifications. They suggest that placing an unequal burden on them is a politically motivated and punitive action, something Section 59 is designed to protect Kentucky citizens against.

The Plaintiffs suggest that the Governor's partial veto after the legislature adjourned invalidates the bill in its entirety. According to the Plaintiffs, such a veto violates Section 88 of the Kentucky Constitution.

The Plaintiffs suggest that House Bill 1 violates Section 51 of the Kentucky Constitution which requires the title of an act to give fair and reasonable notice of its contents and requires that a bill relate to no more than one subject. The Plaintiffs claim that the bill's title, "An Act relating to health care and safety, providing for revenues to finance health care, making appropriations, and declaring an emergency," violated Section 51, because the title failed to mention the provider tax. The bill also violated Section 51, according to the Plaintiffs, because it

dealt with more than one subject, financing and the establishment of the Commission.

The Plaintiffs also claim that the Senate amendment violated Section 47 of the Kentucky Constitution, which requires revenue bills to originate in the House. Section 47 permits the Senate to amend revenue bills but nothing unrelated to raising revenue may be introduced. The provision for the Health Care Data Commission, according to the Plaintiffs, constituted a new matter, unrelated to raising revenue.

The Plaintiffs also object to House Bill 1 because it creates, in the Commission a powerful, independent state agency, not answerable to any of the three branches of government. Therefore, the Plaintiffs claim, the establishment of that agency is a violation of separation of powers.

The Plaintiffs object to Section 17 of House Bill 1 because it provides that the Revenue Cabinet may require providers to post a bond in an amount to be determined by the Cabinet. The Plaintiffs claim that this is an unconstitutional delegation of power to the Cabinet which violates Sections 29 and 60 of the Kentucky Constitutions.

The Plaintiffs maintain that Sections 6, 8, and 16 of House Bill No. 1 amount to an unconstitutional delegation of the state's power to tax in violation of Sections 27, 28, 29, 42, 47, and 60 of the Kentucky Constitution. These sections of the bill give the Revenue Cabinet discretion to raise and lower provider taxes and to expand the list of services subject to the tax, as federal law permits. Section 16 requires providers to remit taxes directly to the Revenue Cabinet on a monthly basis, and requires the Revenue Cabinet to notify providers of any rate change.

The Plaintiffs object to Section 26 of House Bill 1, allowing the Commission to enter providers' premises and conduct independent audits. According to the Plaintiffs, this Section permits unbridled agency discretion in investigating physicians' medical offices. Such unlimited discretion violates the Fourth Amendment to the United States

Constitution and Section 10 of the Kentucky Constitution, according to the Plaintiffs.

The Plaintiffs also object to Sections 23 through 29 because they require providers to furnish patient records and information to the Commission in violation of the right to privacy guaranteed by the United States and Kentucky Constitutions.

2. GROUNDS FOR RELIEF, *HEALTH MAINTENANCE ORGANIZATION ASSOCIATION OF KENTUCKY, ET AL.*

The Health Care Maintenance Organization Association of Kentucky, Inc., et al. requests temporary and injunctive relief from implementing or enforcing House Bill No. 1 against the Plaintiff HMO's, a declaration of rights that House Bill 1 is null, void and unenforceable in violation of the United States and Kentucky Constitutions, restitution of taxes paid pursuant to House Bill 1, and attorney fees and costs.

The Plaintiff HMO's assert the same constitutional grounds in opposition to House Bill 1 as do the *Smith* Plaintiffs but make additional arguments.

The HMO's claim that House Bill 1 does not tax HMO premiums paid by members to insure coverage. They maintain that the language of the bill itself and the intent of the Legislature prove this claim. The word "premiums" is not used in the bill and the bill is limited to taxes on gross revenues received "for the provision of health care items or services." HMO's are not "providers" in the sense intended by House Bill 1 but are third party payers, according to the Plaintiffs.

The Plaintiffs claim that HMO premiums may not be taxed under federal law. House Bill 1 provides for "permissible health-care related taxes" and federal regulations only permit taxes on HMO services, not premiums.

The Plaintiffs claim that HMO's are not eligible to participate in Medicaid in Kentucky and are therefore ex-

cluded from taxation under House Bill 1. Kentucky law requires CHR to determine what groups may participate in Medicaid and CHR regulations require that an HMO have a contract with CHR in order to provide Medicaid services. There is no contract between any HMO and CHR to provide such services. While it is potentially possible for HMO's to participate in the state's Medicaid program, that is not the case now and, therefore, HMO's may not be taxed under House Bill 1.

The Plaintiffs also maintain that federal law preempts House Bill 1 because it relates to group health plans and seeks to impose a tax on a payment made for federal employee health plans. According to the Plaintiffs, the Employee Retirement Income Security Act ("ERISA") preempts all state laws relating to any employee benefit plan. House Bill 1 will change the price, quality, and character of ERISA plans HMO's offer. Because of this, House Bill 1 is preempted by ERISA. The Federal Employee Health Benefit Act ("FEHBA") also preempts House Bill 1 because, according to the Plaintiffs, the bill seeks to impose a tax on a federal employee health plan.

3. DEFENDANT'S RESPONSE TO PLAINTIFF'S CLAIMS

The Defendants request that the Court grant their Motion for Summary Judgment and hold House Bill No. 1 constitutional.

The Defendants assert several grounds in support of their Motion. They claim that House Bill No. 1 does not violate due process or equal protection under the United States or Kentucky constitutions. They maintain that the state has broad authority to establish classifications for the purpose of taxation. The Defendants deny that House Bill No. 1 is special legislation, prohibited by Section 59 because legislative classifications with rational basis do not constitute special legislation. Defendants also claim that voluntary compliance with a federal statutory scheme has been found to be general legislation. *Wagoner* v. *Wagoner,* Ky., 846 S.W.2d 704 (1993). They maintain that the

Governor properly exercised the line item veto because House Bill No. 1 is an appropriations bill and the Governor is authorized to make line item vetoes in such bills. Even in cases where a veto is improperly exercised, the bill in question becomes law with the vetoed portion intact, according to the Defendants.

The Defendants also maintain that Section 51 of the Kentucky Constitution, pertaining to the title and contents of bills, has not been violated. The Defendants point out that this Section has always been liberally construed with doubts as to compliance resolved in favor of the legislative act. They also maintain the Section 47 has not been violated because the Senate amendment creating the Health Care Data Commission was intricately related to the remainder of the bill. Data collection such as that provided for by the amendment is vital to the proper administration of indigent care.

The Defendants also maintain that principles of separation of powers have not been violated by House Bill 1. The disputed bond requirement is an administrative compliance tool. The creation of Health Care Data Commission itself is not a violation of separation of powers because, while it is an independent agency, it is clearly an executive branch agency.

The Defendants argue that the collection of data by the Commission will not violate the privacy rights of physicians or patients. Data collected will involve cost, quality, and outcome and the confidentiality of medical records will not be compromised.

In regard to the specific assertions of the HMO Plaintiffs, Defendants claim that the plain language of the bill permits taxation of HMO premiums and HMO's are not prohibited by state law from participating in Medicaid. They also maintain that ERISA and FEHBA do not preempt House Bill No. 1.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

There being no issue of material fact in dispute, all parties have moved for Summary Judgment pursuant to Civil Rule 56 and *Steelvest* v. *Scansteel Service Center, Inc.*, Ky., 807 S.W.2d 476 (1991).

The Governor's veto of a portion of House Bill 1, Section 20, was a proper exercise of the line item veto provided for in Section 88 of the Kentucky Constitution. That Section provides that "[t]he Governor shall have the power to disapprove any part or parts of appropriation bills embracing distinct items. . . ." Ky. Const. Section 88. House Bill 1 is an appropriation act as defined in KRS 48.010(4): "any act of the general assembly that authorizes the expenditure of public funds. . . ." House Bill 1 clearly authorizes the expenditure of public funds. House Bill 1, Section 20, for example, establishes and allocates revenue to the MART and MAIT funds. The Governor's veto was in compliance with Section 88 and, therefore, does not invalidate House Bill 1.

House Bill 1 does not violate the provision of Section 51 of the Kentucky Constitution which requires that the subject matter of a bill be reflected in its title. Therefore, House Bill 1 cannot be invalidated on that ground.

House Bill 1 was amended by the Senate to establish the Health Care Data Commission ("the Commission"). (House Bill 1, Sections 22-29.) The Plaintiffs claim that this amendment is invalid under Kentucky Constitution because it violates: (1) the separation of powers provisions of Sections 27 and 29 by creating an independent agency; (2) Section 47 because the amendment is unrelated to raising revenue; and (3) Section 51 because the amendment causes the bill to relate to more that one subject and the title does not reflect the Commission's establishment.

The Court is not convinced by Plaintiff's argument that the Commission is an independent agency. The Sections of House Bill 1 establishing the Commission refer to it as "an independent agency of state government" (House Bill

1, Section 23(1)) but the Commission is, in fact, an executive branch agency. It is required by statute to coordinate its activities with other executive agencies, (House Bill 1, Section 24(3)), it is administratively attached to the Cabinet for Human Resources, (House Bill 1 Section 23(1)), and its members are appointed by the Governor and may be removed by him for cause, (House Bill 1, Section 23(2)). For these reasons, the Court finds that the Health Care Data Commission is an executive agency and not an independent agency. Therefore, Sections 27 and 28 of the Kentucky Constitution are not violated by House Bill 1, Sections 22-29.

That portion of House Bill 1 that establishes the Commission does violate Section 47 of the Kentucky Constitution. Section 47 requires revenue bills to originate in the House and permits the Senate to amend such bills only if, "no new matter . . . [is] introduced, under color of amendment, which does not relate to raising revenue." Ky. Const. Section 47. The Commission's purpose is to collect data on health services in Kentucky. This purpose is not limited to services funded by Medicaid but includes data collection on all health services. (House Bill 1, Section 23.)

In *Farris* v. *Shoppers Village Liquors, Inc.*, Ky., 669 S.W.2d 213, 213-214 (1984), the Kentucky Supreme Court decided a similar issue. In *Farris*, the Court considered a bill passed by the 1982 session of the General Assembly, "An Act Relating to Revenue and Taxation." This legislation established a 9 percent tax on the wholesale distribution of liquor and repealed a tax on the retail sale of liquor. A Senate amendment to the act established procedures for the sale and delivery of alcohol, specifying the information that must be recorded on invoices and requirements regarding the place of delivery. In *Farris*, the Supreme Court held that the Senate amendment did not relate to the subject matter of revenue and taxation and, therefore, violated Section 47 of the Kentucky Constitution.

The Senate amendment in this case is similarly unrelated to revenue and taxation. The Commission's authority to gather information applies to all health services performed in the state, not just Medicaid services. The Commission is authorized to collect data not only on cost but also on the "quality, and outcomes of health services." (House Bill 1, Section 23(1)). The Commission's mandate is as distinct from raising revenue as is the amendment in *Farris* setting out the data elements required for liquor invoices. The Commission's prescribed duties do not relate to raising revenue but to monitoring the medical treatment of every citizen in the state of Kentucky. Therefore, the Court finds that Sections 22-29 of House Bill 1 violate Section 47 of the Kentucky Constitution.

The two percent tax on physicians' gross revenues provided for in House Bill 1, Section 3 violates Section 59 of the Kentucky Constitution which prohibits special legislation. Section 59 provides, in pertinent part:

> The General Assembly shall not pass local or special acts concerning any of the following subjects, or for any of the following purposes, namely:
>
> . . . .
>
> Fifteenth: To authorize or to regulate the levy, the assessment or the collection of taxes, or to give any indulgence or discharge to any assessor or collector of taxes, or to his sureties.

The purpose of Section 59 is illuminated in *City of Louisville* v. *Kuntz*, Ky., 47 S.W. 592 (1898). In *Kuntz* at 593, the Court of Appeals described Section 59 as "a safeguard . . . for the protection of the weak as well as the strong" which prohibited "the legislature from discriminating in favor of or against individuals or classes." Special legislation is defined in *Board of Education of Jefferson County* v. *Board of Education of Louisville*, Ky., 472 S.W.2d 496, 498 (1971) as "legislation which arbitrarily or beyond reasonable justification discriminates against some persons or objects and favors others." In *Kling* v. *Geary*, Ky., 667 S.W.2d 379, 382 (1984), the Supreme Court held that there

is no special legislation "[w]here the legislature establishes a classification made upon a reasonable and natural distinction which relates logically to the purpose of the Act."

House Bill 1, Section 3 is not limited to the 60 percent of physicians participating in the Medicaid program but applies to the gross revenues of all physicians practicing medicine in Kentucky. This section constitutes special legislation, prohibited by Section 59 of the Kentucky Constitution. The classifications established in the Act are not based upon reasonable and natural distinctions and are not logically related to the purposes of the legislation. There is no reasonable basis to single out these health care providers to pay special taxes to support the Medicaid program. This program benefits the state's residents as a whole and there are no justifiable reasons for arbitrarily designating physicians to pay for it. Section 59 was designed to restrict the legislature from favoring or disfavoring particular groups, however advantageous it may be to do so. The increase in funding and the indirect benefit to 60 percent of physicians who participate in providing services for the program do not support a rationale for overcoming the proscriptions of Section 59 of the Kentucky Constitution. The classifications set up in House Bill 1 are not logically related to the purpose of the Act, which is to increase funding for the Medicaid program.

The Commonwealth is not simply complying with a mandated federal statutory scheme, but is rewriting the law to avoid loss of some federal funding. The Federal government does *not* require that providers be taxed but sets specific guidelines and limitations for states that decide to do so. Federal permission does not provide sufficient rationale to overcome Section 59 of the Kentucky Constitution.

Therefore the tax on the gross revenues of all physicians practicing in Kentucky is invalid. The same reasoning applies to physicians employed by HMO's. The salaries of physicians employed by HMO's may not be taxed under House Bill 1.

In light of this Court's determination that the tax on physicians violates Section 59 of the Kentucky Constitution, it is not necessary to address the issues of due process and equal protection.

HMO premiums may not be taxed under House Bill 1. The legislative history of House Bill 1 shows that the General Assembly never intended that HMO premiums be taxed. Prior to the bill's approval, Representative Billy Ray Smith proposed an amendment declaring that HMO premiums were not subject to the taxes imposed therein. In its Summary of Floor Amendments to the Second Committee Substitute to House Bill 1, the Legislative Research Commission noted that Smith's amendment was, "probably not necessary since it is fairly clear that HMO premiums would not be subject to the tax." (Summary of Floor Amendments, at 5.) In floor debates, Representative Ernesto Scorsone claimed that Smith's amendment was not needed. Representative Scorsone said, "[I]t's pretty clear that the only thing we are taxing are services. That's the only thing we can tax . . . so the HMO fee would not be taxed under this law." (Transcript of House Floor Debate of May 21, 1993.) Representative Smith withdrew his amendment after this statement. It is clear that the legislative intent was not to include HMO premiums among the provider taxes established in House Bill 1.

The provisions of House Bill 1 establishing the Health Care Data Commission and taxing physicians are unconstitutional. The General Assembly never intended that HMO's be taxed.

THEREFORE, it is the JUDGMENT of this Court that: (1) the Commission on Health Care Data Collection is ENJOINED from taking any action; (2) Plaintiffs' Motion requesting a Permanent Injunction enjoining the Revenue Cabinet from any further collection of taxes from plaintiff physicians or HMO's is GRANTED; and (3) the Revenue Cabinet is ORDERED to remit refunds on taxes already paid by plaintiff physicians and HMO's within 90 days of this Order.

So ORDERED this 23rd day of November, 1993.

There being no just reason for delay, this is a final and appealable JUDGMENT.

/s/ Roger L. Crittenden
Roger L. Crittenden
Judge, Franklin Circuit Court

SUPREME COURT OF KENTUCKY

93-SC-946-TG

COMMONWEALTH OF KENTUCKY
REVENUE CABINET, Et Al - - - - - *Appellants*

v.

CHARLES C. SMITH, JR., M.D., Et Al - - - *Appellees*

On Review From the Court of Appeals
93-CA-2840-TI
(Franklin Circuit Court No. 93-CI-0959)

ORDER DENYING PETITION FOR REHEARING

AND

ORDER DENYING MOTION FOR ORAL ARGUMENT

Appellees petition for rehearing and appellees motion for oral argument in the above-styled appeal are denied.

Stephens, C. J., and Reynolds and Wintersheimer, JJ., concur. Special Justices Stephen C. Cawood, Ben S. Fletcher III and R. Kent Westberry concur.

ENTERED: June 23, 1994.

/s/ Robert F. Stephens
Chief Justice